# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes and proclamations involved | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 11 |
| Appendix | 12 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Ahrens* v. *Clark*, No. 446, this Term | 11 |
| *Citizens Protective League* v. *Clark*, 155 F. (2d) 290, certiorari denied, 329 U. S. 787 | 8, 9, 10 |
| *Graber, Ex parte*, 247 Fed. 882 | 9, 11 |
| *Minotto* v. *Bradley*, 252 Fed. 600 | 11 |
| *United States* v. *Ackermann et al.*, 53 F. Supp. 611, reversed as to another defendant, 144 F. (2d) 866 | 3, 5 |
| *United States ex rel. Hack* v. *Clark*, 159 F. (2d) 552 | 8 |
| *United States ex rel. Knauer* v. *Jordan*, 158 F. (2d) 337, certiorari denied, 331 U. S. 810 | 8 |
| *United States ex rel. Schlueter* v. *Watkins*, 67 F. Supp. 556, affirmed, 158 F. (2d) 853 | 8, 9, 10 |
| *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. 2d 898 | 7, 9 |
| *United States ex rel. Umecker* v. *McCoy*, 54 F. Supp. 679, affirmed 144 F. (2d) 354 | 7, 9 |
| *United States ex rel. Zdunic* v. *Uhl*, 137 F. (2d) 858 | 7 |
| *United States* v. *Morgan*, 313 U. S. 409 | 10 |
| Statutes; Constitution: | |
| Fifth Amendment | 6 |
| Alien Enemy Act of 1798, as amended (50 U. S. C. 21) | 8, 12 |
| Miscellaneous: | |
| Presidential Proclamation 2525 (6 Fed. Reg. 6321): Section 7 (6 Fed. Reg. 6323) | 7, 8, 14 |
| Presidential Proclamation 2526 (6 Fed. Reg. 6323) | 5, 6, 8, 9, 13 |
| Warren, *Supplemental Brief of the United States in Support of the Plenary Power of Congress over Alien Enemies and the Constitutionality of the Alien Enemy Act (Revised Statutes, Sections 4067–4070)*, G. P. O. [1918] pp. 42–43, 52–64 | 9 |




778353—48——1

# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 584

UNITED STATES EX REL. HANS ACKERMANN,
PETITIONER

*v.*

J. L. O'ROURKE, OFFICER IN CHARGE OF ALIEN INTERNMENT CAMP AT CRYSTAL CITY, TEXAS

No. 585

UNITED STATES EX REL. FRIEDA ACKERMANN,
PETITIONER

*v.*

J. L. O'ROURKE, OFFICER IN CHARGE OF ALIEN INTERNMENT CAMP AT CRYSTAL CITY, TEXAS

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The judgments of the courts below were entered without opinion (R. (H) 29, 40; R. (F) 4, 12).[1]

[1] Record references to No. 584, the *Hans Ackermann* case, will be indicated R. (H); record references to No. 585, the

## JURISDICTION

The judgments of the Circuit Court of Appeals for the Fifth Circuit were entered on November 14, 1947 (R. (H) 41; (F) 13). The petition for writs of certiorari was filed on February 9, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether internment orders, issued by the Attorney General pursuant to Section 21 of the Alien Enemy Act and Presidential Proclamation 2526, against petitioners, German alien enemies, are invalid on the ground that the Attorney General was without power to intern alien enemies resident of and within the continental United States at the time of their apprehension.

## STATUTES AND PROCLAMATIONS INVOLVED

The pertinent portions of the Alien Enemy Act and the Presidential Proclamations involved are set forth in the Appendix, *infra*, pp. 12–15.

## STATEMENT

Petitioners are native-born Germans who immigrated to the United States in 1925 and have re-

---

*Frieda Ackermann* case, will be indicated R. (F). The cases were tried together on the stipulation that the pleadings, motions, orders, and judgments in each case would be identical (R. (F) 2; Pet. 8–9).

sided since in Texas (R. (H) 2). In June 1938, they became naturalized citizens of the United States (R. (H) 2). On December 7, 1943, the District Court for the Western District of Texas revoked its orders granting petitioners admission to citizenship and cancelled their certificates of citizenship on the ground that these certificates had been procured by fraud (R. (H) 14; *United States* v. *Ackermann et al.*, 53 F. Supp. 611, reversed as to another defendant, 144 F. (2d) 866 (C. C. A. 5)).[2] On April 29, 1944, petitioners were interned by orders of the Attorney General

[2] In the denaturalization proceedings, the court found that, at the time of their naturalization, petitioners had not renounced allegiance to Germany. It was shown that Hans was co-owner and publisher of the Texas Herold, a German-language newspaper; that the paper was the official organ of the Kyffhauser Bund and, for several years prior to petitioners' naturalization proceedings, had maintained a strong pro-Nazi editorial policy; that both petitioners were extremely pro-Nazi and had assisted in the formation of a Bund unit at Taylor, Texas; that both petitioners had visited Germany in 1939 as guests of the German Ministry of Propaganda and Enlightenment; and that the paper customarily reprinted German-published propaganda articles and pamphlets. The court stated that, although there was no direct evidence that petitioners were members of the German-American Bund, the circumstantial evidence was such as to point to a strong allegiance if not a direct connection with that organization. It concluded from all of the "clear, uneqivocal, and convincing" evidence that at the time petitioners swore allegiance to the United States they had not renounced their allegiance to Germany. 53 F. Supp. at 613–616. Petitioners do not now attack that decision, and apparently concede that they are here properly classified as "alien enemies" (Pet. 17, 27, 28).

(R. (H) 12–13; R. (F) 2) and in August, 1945, were served with notices which recited that, on the basis of evidence adduced at former hearings before the Alien Enemy Hearing Board, it was determined that they should be removed and repatriated to the country of their nationality as soon as arrangements for transportation could be made (R. (H) 4).[3]

On May 27, 1946, petitioners applied to the District Court for the Western District of Texas for writs of habeas corpus addressed to the officer in charge of the Alien Internment Camp at Crystal City, Texas, seeking their release from detention (R. (H) 1–8). They alleged that they were being illegally detained in violation of their constitutional rights, and that their contemplated removal was illegal and contrary to the provisions of the Constitution and laws of the United States, natural and international law, and the dictates of humanity (R. (H) 6–7). The writs were issued by the district court on May 27, 1946 (R. (H) 9–10), and the returns made on June 19, 1946 (R. (H) 12–13). Amended returns were made on June 20, 1946 (R. (H) 13–16),[4] and, following

[3] The Department's records show that removal orders were issued on January 15, 1946.

[4] In its amended return, the Government denied that petitioners were being illegally held, asserting that petitioners were German alien enemies and that their internment had been ordered by the Attorney General pursuant to the Alien Enemy Act and the Presidential Proclamations issued thereunder (R. (H) 13–16).

petitioners' answers (R. (H) 17–21),[5] the Government moved for judgments on the pleadings (R. (H) 27–28). On July 31, 1946, the district court granted the Government's motions, dismissed the writs, and entered judgments accordingly (R. (H) 29; R. (F) 4). On appeals by each petitioner the court below affirmed without opinion (R. (H) 40; R. (F) 12).

## ARGUMENT

Petitioners do not here challenge the validity of their denaturalization proceedings (see *United States* v. *Ackermann et al.*, 53 F. Supp. 611 (W. D. Tex.), reversed as to another defendant, 144 F. (2d) 866 (C. C. A. 5)), and no claim is made that the Alien Enemy Act or any of the Presidential proclamations or regulations issued pursuant thereto are invalid (Pet. 16–17). While conceding the power of the President to delegate his general authority with respect to the restraint of alien enemies during wartime to the Attorney General, petitioners contend that under Procla-

[5] In their answers petitioners again alleged that they were being illegally detained. They urged that since they had not been denaturalized until a date subsequent to the declaration of war between the United States and Germany the Attorney General lacked the power under Section 21 of the Alien Enemy Act to order their internment (R. (H) 17–18). They further urged that their hearings had been arbitrary, capricious and illegal; that the Attorney General was without power to determine the propriety of their internment; and that they had never been accorded a hearing in any court of the United States (R. (H) 18–21).

mation 2526 (Appendix, *infra*, pp. 13–14), the President did not in fact authorize the Attorney General to determine the propriety of internment or to order the internment of alien enemies actually within the continental United States at the time of their apprehension (Pet. 17). They argue that as to these alien enemies, Proclamation 2526 authorized the Attorney General merely to (1) make arrests, (2) designate places of detention, and (3) prescribe permits for those whom he deemed dangerous to the public safety, and that the power to order internment could be validly exercised only against alien enemies found in the territories and possessions (Pet. 19–24); that the authority of the Attorney General extended only to those alien enemies deemed dangerous to the public safety as distinguished from those deemed "potentially dangerous" (Pet. 21, 23, 27); and that in any event the guarantees of the Fifth Amendment granted them a right to a judicial determination of the propriety of their internment (Pet. 24–26, 27–32).

1. There is no merit to petitioners' argument that Proclamation 2526 (6 Fed. Reg. 6323) did not in fact convey to the Attorney General the power to intern alien enemies resident in the continental United States. Proclamation 2526, applicable to German alien enemies, specifically charged the Attorney General with the duty of executing regulations with regard to the conduct of alien enemies within the continental United

States, and specifically directed him to apprehend such alien enemies as in his judgment were subject to apprehension for deportation under such regulations. It also made applicable to German alien enemies the regulations already issued with regard to Japanese alien enemies and contained in Proclamation 2525 (6 Fed. Reg. 6321). Section 7 of Proclamation 2525 (6 Fed. Reg. 6323) specifically vests in the Attorney General the power to apprehend and intern those alien enemies within the continental United States deemed dangerous [6] to the public safety. See Appendix, *infra*, pp. 14–15. It is thus clear on the face of the Proclamations that the Attorney General was specifically given the power to intern alien enemies residing within the continental United States at the time of their apprehension, a power which has been consistently assumed by every court which has had occasion to consider the question. See *United States ex rel. Zdunic* v. *Uhl*, 137 F. (2d) 858 (C. C. A. 2); *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. (2d) 898 (C. C. A. 2); *United States ex rel. Umecker* v. *McCoy*, 54 F. Supp. 679 (D. N. D.), affirmed, 144 F. (2d)

[6] The internment orders directed against petitioners recited that they were deemed "potentially dangerous to the public peace and safety of the United States" (R. (H) 12–13). Petitioners seek to find some distinction of significance between "dangerous" and "potentially dangerous," and, from such distinction, argue that the internment orders herein were beyond the Attorney General's authority (Pet. 21, 23, 27). We consider it unnecessary to discuss this contention.

354 (C. C. A. 8); *Citizens Protective League* v. *Clark,* 155 F. (2d) 290 (App. D. C.), certiorari denied, 329 U. S. 787; *United States ex rel. Knauer* v. *Jordan,* 158 F. (2d) 337 (C. C. A. 7), certiorari denied, 331 U. S. 810; *United States ex rel. Schlueter* v. *Watkins,* 67 F. Supp. 556 (S. D. N. Y.), affirmed, 158 F. (2d) 853 (C. C. A. 2); *United States ex rel. Hack* v. *Clark,* 159 F. (2d) 552 (C. C. A. 7). Petitioners' argument to the contrary is based on a confused use of those provisions of the two executive proclamations which grant similar powers to the Secretary of War with regard to alien enemy administration in the Canal Zone, the Hawaiian Islands and the Philippine Islands. Section 7 of Proclamation 2525; Proclamation 2526, Appendix, *infra,* pp. 14–15.

2. Petitioners' second argument is that they possess a right, guaranteed by the Fifth Amendment, to a judicial review of the Attorney General's action in ordering their internment pursuant to the Alien Enemy Act and the related proclamations. This assertion is also without merit. Section 21 of the Alien Enemy Act, Appendix, *infra,* pp. 12–13, authorizes the President to direct "the manner and degree of the restraint to which" "all natives, citizens, denizens, or subjects" of a hostile nation or government shall be subject "whenever there is a declared war between the United States and any foreign nation or government." Pursuant to that statutory

authority, the President, on December 8, 1941, issued Proclamation 2526 in which, as we indicated, he directed the Attorney General to provide for the apprehension and internment of all German alien enemies within the continental United States whom he deemed dangerous to the public safety (Appendix, *infra*, pp. 13–14).

The essence of Section 21 and the implementing proclamations is the plenary and uncontrolled executive power to restrain alien enemies in time of war. Warren, *Supplemental Brief of the United States in Support of the Plenary Power of Congress over Alien Enemies and the Constitutionality of the Alien Enemy Act (Revised Statutes, Sections 4067–4070)*, G. P. O. [1918] pp. 42–43. The vulnerability of alien enemies to executive command during time of war embodies traditional recognition of the "overriding necessities of the power to wage war successfully." *Citizens Protective League* v. *Clark*, 155 F. (2d) 290, 294 (App. D. C.), certiorari denied, 329 U. S. 787. The lack of power in the courts to review internment orders issued under the Alien Enemy Act constitutes a well settled aspect of this broad executive power. *Ex parte Graber*, 247 Fed. 882, 885–887 (N. D. Ala.). Cf. *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F. (2d) at 900; *United States ex rel. Schlueter* v. *Watkins*, 67 F. Supp. at 565; *United States ex rel. Umecker* v. *McCoy*, 54 F. Supp. at 680; *Citizens Protective League* v.

*Clark*, 155 F. (2d) at 294.[7] Nor can any implication of arbitrariness or irresponsible action arise from the action of Congress in vesting this power exclusively in the executive branch. "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption." *United States* v. *Morgan*, 313 U. S. 409, 421.

The principles set forth in the foregoing cases completely answer petitioners' contention that they were entitled to judicial review of the internment orders here involved. And no different result follows from petitioners' attempted reliance on Sections 23 and 24 (Pet. 24–26), provisions of the statute which have no relevance to this case. "Court jurisdiction, conferred solely by Section 23, arises only when a 'complaint' is filed by a citizen. When the procedure is through executive action, the statute calls for no hearing in court or elsewhere." *United States ex rel.*

[7] Judicial determination can, of course, be obtained on the question of alien enemy status. See *Citizens Protective League* v. *Clark*, 155 F. (2d) at 294. No such jurisdictional question is here involved.

*Schlueter* v. *Watkins,* 158 F. (2d) at 853; *Minotto* v. *Bradley,* 252 Fed. 600, 604 (N. D. Ill.); *Ex parte Graber,* 247 Fed. 882, 884–5 (N. D. Ala.).

## CONCLUSION

The decisions below are correct and there is no conflict. Were it not for the pendency before this Court, in No. 446, *Ahrens* v. *Clark.* of the question of the basic power to control German nationals after the cessation of hostilities but before the termination of the war, we would think it clear that the petition for writs of certiorari in this case should be denied. In view, however, of the pendency of the *Ahrens* case, we think that this Court might appropriately defer disposition of the present petition until after the decision in the *Ahrens* case.

Respectfully submitted.

PHILIP B. PERLMAN,
*Solicitor General.*
H. G. MORISON,
*Assistant Attorney General.*
SAMUEL D. SLADE,
EMERY COX, Jr.,
*Attorneys.*

MARCH 1948.

## APPENDIX

1. The Alien Enemy Act of 1798, as amended, provides:[1]

> SEC. 21. Restraint, regulation and removal.
>
> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are

[1] The section number used is that found in Title 50 of the United States Code.

found necessary in the premises and for the public safety.

2. Presidential Proclamation 2526, 6 F. R. 6323, provides in part:

* * * * *

DUTIES AND AUTHORITY OF THE ATTORNEY GENERAL AND THE SECRETARY OF WAR

And, pursuant to the authority vested in me, I hereby charge the Attorney General with the duty of executing all the regulations hereinafter prescribed regarding the conduct of alien enemies within continental United States, Puerto Rico, the Virgin Islands, and Alaska, and the Secretary of War with the duty of executing the regulations which are hereinafter prescribed and which may be hereafter adopted regarding the conduct of alien enemies in the Canal Zone, the Hawaiian Islands and the Philippine Islands. Each of them is specifically directed to cause the apprehension of such alien enemies as in the judgment of each are subject to apprehension or deportation under such regulations. In carrying out such regulations within the continental United States, Puerto Rico, the Virgin Islands, and Alaska, the Attorney General is authorized to utilize such agents, agencies, officers and departments of the United States and of the several states, territories, dependencies and municipalities thereof and of the District of Columbia as he may select for the purpose. Similarly the Secretary of War in carrying out such regulations in the Canal Zone, the Hawaiian Islands and the Philippine Islands is authorized to use such agents, agencies, officers

and departments of the United States and of the territories, dependencies and municipalities thereof as he may select for the purpose. All such agents, agencies, officers and departments are hereby granted full authority for all acts done by them in the execution of such regulations when acting by direction of the Attorney General or the Secretary of War, as the case may be.

REGULATIONS

The regulations contained in Proclamation No. 2525 of December 7, 1941, relative to natives, citizens, denizens or subjects of Japan are hereby incorporated in and made a part of this proclamation, and shall be applicable to alien enemies defined in this proclamation.

This proclamation and the regulations herein prescribed shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States.

* * * * *

3. Paragraph 7 of Presidential Proclamation 2525 (6 F. R. 6321, 6323) provides:

(7) Alien enemies deemed dangerous to the public peace or safety of the United States by the Attorney General or the Secretary of War, as the case may be, are subject to summary apprehension. Such apprehension shall be made in the continental United States, Alaska, Puerto Rico and the Virgin Islands by such duly authorized officer of the Department of Justice as the Attorney General may determine. In the Canal Zone, the Hawaiian Islands and the Philippine Islands, such arrests shall be made by the Military Commanders in

each such territory by authority of the respective Military Governors thereof, and if there be no Military Governor, then by authority of the Secretary of War. Alien enemies arrested shall be subject to confinement in such place of detention as may be directed by the officers responsible for the execution of these regulations and for the arrest, detention and internment of alien enemies in each case, or in such other places of detention as may be directed from time to time by the Attorney General, with respect to continental United States, Alaska, Puerto Rico and the Virgin Islands, and by the Secretary of War with respect to the Canal Zone, the Hawaiian Islands and the Philippine Islands, and there confined until he shall have received such permit as the Attorney General or the Secretary of War with respect to the Canal Zone, the Hawaiian Islands and the Philippine Islands shall prescribe.

U. S. GOVERNMENT PRINTING OFFICE: 1940